

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

To be argued by
Jerome F. O'Neill

Docket No.

77-1391
77-1392
77-1393

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

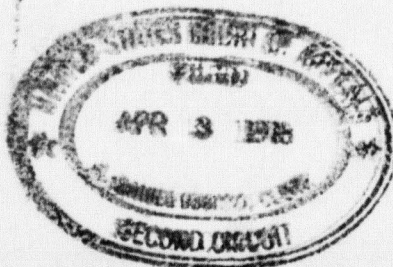
v.

JOSEPH H. DUPAW
ANTHONY PERSUITTI
BERNARD J. WOODMANSEE, SR.

Appellants

Appeal from the United States District
Court for the District of Vermont

BRIEF AND APPENDIX FOR THE UNITED STATES



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FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA Appellee

v.

JOSEPH H. DUPAW
ANTHONY PERSUITTI Appellants
BERNARD J. WOODMANSEE, SR.

BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

Joseph H. Dupaw, Anthony Persuitti and Bernard J. Woodmansee, Sr. appeal from judgments and convictions entered in the United States District Court for the District of Vermont on September 14, 1977, after a six-week trial before the Honorable James S. Holden, Chief United States District Judge, and a jury.

An indictment bearing criminal number 77-19 and filed on May 12, 1977* charged the defendants as follows:

* Defendants originally were charged in an indictment handed up by the grand jury on March 31, 1977. This indictment contained counts identical to those in the superseding indictment, except that the conspiracy count charged a broader scope of activity in the first indictment.

Count 1 charged defendant Anthony Persuitti and Paul E. Caruso* with entering The Merchants Bank, South Burlington, Vermont on March 27, 1976 with intent to commit a felony in the bank, to wit, the robbery by force, violence and intimidation of the bank and its employees; defendant Joseph H. Dupaw was charged with aiding and abetting this offense, in violation of 18 U.S.C. §§ 2113(a), 2;

Count 2 charged defendant Joseph H. Dupaw with aiding and abetting Douglas J. Ferrier** and Paul E. Caruso in entering the Franklin-Lamoille Bank, Milton, Vermont, on April 29, 1976, with intent to commit a felony in the bank, to wit, the robbery by force, violence and intimidation of the bank and its employees, in violation of 18 U.S.C. §§ 2113(a), 2;

* Caruso was charged in an indictment filed on January 13, 1978 in 3 counts with entering The Merchants Bank on March 27, 1976 with intent to commit robbery, with entering the Franklin-Lamoille Bank, Milton, Vermont on April 29, 1976 with intent to commit robbery, and with the armed robbery of The Merchants Bank, South Burlington, Vermont on May 1, 1976. Caruso pleaded guilty to the armed robbery of The Merchants Bank and testified for the Government in this case. He was sentenced to 15 years imprisonment which was later reduced to 12 years. See D. Vt. Cr. No. 77-2.

** Ferrier was charged in an indictment filed February 3, 1977 in counts identical to those which Caruso was charged with, entered the same plea and received the same sentence. See D. Vt. Cr. No. 77-4.

Count 3 charged defendant Joseph H. Dupaw with aiding and abetting Paul E. Caruso and Douglas J. Ferrier in the May 1, 1976 taking by force and violence and by intimidation from employees of The Merchants Bank, White Street Branch, South Burlington, Vermont, of \$46,275.71 in cash and \$29,860.00 in travelers checks, during which Ferrier and Caruso put in jeopardy the lives of employees of the bank by means of a handgun, in violation of 18 U.S.C. §§ 2113(a)(d), 2;

Count 4 charged defendants Joseph H. Dupaw, Bernard J. Woodmansee, Sr. and Bernard J. Woodmansee, Jr. with possessing, concealing, storing, bartering, selling and disposing of proceeds of the robbery of The Merchants Bank, which proceeds were valued at in excess of \$100.00, knowing the money to have come from the bank robbery, in violation of 18 U.S.C. §§ 2113(c), 2;

Count 5 charged defendants Joseph H. Dupaw, Anthony Persuitti, Bernard J. Woodmansee, Sr., Bernard J. Woodmansee, Jr. and Jeffrey Wall* together with co-conspirators Paul E. Caruso and Douglas J. Ferrier with conspiracy to receive, possess, conceal, store, barter,

* Wall pleaded guilty, was placed in the U.S. Marshal's Service Witness Protection Program and testified for the Government.

sell and dispose of property valued at in excess of \$100.00 knowing the same to have been stolen from a bank, in violation of 18 U.S.C. § 371.

The trial of all defendants began on June 13, 1977 and on July 22, 1977 the jury returned a verdict of guilty to counts 1, 3, 4 and 5 with respect to defendant Dupaw;* guilty on counts 1 and 5 as to defendant Persuitti, the two counts in which he was named; and guilty on counts 4 and 5 as to defendant Woodmansee, Sr., the two counts in which he was named. Bernard J. Woodmansee, Jr. changed his plea to guilty on count 4 (receipt of bank robbery proceeds) part way through the trial, on June 30, 1977.

On September 14, 1977 Judge Holden sentenced defendant Dupaw to eight years in the custody of the Attorney General on counts 1, 3 and 4 and five years on count 5, all to run concurrently;** defendant Persuitti to seven years on count 1 and five years on

* Judge Holden dismissed count 2 of the indictment at the close of the Government's case.

** Defendant Dupaw entered a plea of guilty on August 15, 1977 to one count of an eight-count indictment charging him with fraud against the United States and making false statements to a U.S. agency in connection with a U.S. Department of Labor Manpower Administration program Dupaw ran while incarcerated by the State of Vermont at the Chittenden Community Correctional Center, South Burlington, Vermont. By plea agreement his sentence was to be concurrent with that in this case and on November 10, 1977 Judge Coffrin sentenced Dupaw to a two-year concurrent sentence. See D. Vt. Cr. No. 77-22.

count 5, to run concurrently to each other, but consecutive to a Vermont sentence then being served; Bernard J. Woodmansee, Sr. to six years on count 4 and five years on count 5, concurrently, but consecutive to a twelve-year sentence being served for a federal conviction relating to interstate transportation of \$20,000 in stolen travelers checks; Bernard J. Woodmansee, Jr. to four years, with confinement for six months, the remainder suspended and the defendant placed on probation for a period of four years. Jeffrey Wall was sentenced on September 15, 1977 as a young adult offender, the imposition of sentence was suspended and he was placed on probation for a period of five years.

STATEMENT OF ISSUES

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STATEMENT OF FACTS

The Government's case was based in part on the testimony of three co-conspirators, Douglas Ferrier, Paul Caruso and Jeffrey Wall, each of whom entered pleas of guilty to charges connected with this case and testified for the Government. A fourth individual, John S. Savo, previously had entered a plea of guilty to an unrelated federal indictment charging him with possessing and uttering stolen U.S. Treasury checks and also testified for the Government.

Based upon this testimony, as well as other direct and circumstantial evidence, in the light most favorable to the Government, the jury could have found the facts to be as follows:*

Douglas J. Ferrier had known Joseph H. Dupaw since the mid-1960s (Tr.** 1824), and met Paul Caruso in August, 1976 (Tr. 1000), at which time Ferrier was doing janitorial work at The Merchants Bank, South Burlington,

* The facts as summarized here do not chronicle in detail the extensive evidence such as tapes of conversations between Caruso and Dupaw, exchanges of correspondence between them, statements made by Dupaw to the F.B.I., other supporting documentary evidence and testimony as well as various items of evidence corroborating the testimony of Ferrier, Caruso, Wall and Savo.

** Tr. - Transcript. Other abbreviations are GX - Government Exhibit; GA - Government Appendix; DA - Defendant's Appendix.

Vermont. (Tr. 1825-26) Ferrier and Dupaw discussed on many occasions the possibility of robbing this bank (Tr. 1827), as well as the possibility of robbing other Vermont banks in which Dupaw was interested. (Tr. 1828-29, 1834) Dupaw put Ferrier in contact with Caruso as an individual who might be interested in bank robbery. (Tr. 1002-03) Dupaw was Caruso's best friend over the years 1975-77 (Tr. 1572-73), his business manager and adviser (Tr. 2272), and also was Ferrier's contact with Caruso initially. (Tr. 1572-73, 1835-36) Ferrier was not willing at first to become involved personally in a robbery of The Merchants Bank in South Burlington and, with Dupaw's help, Anthony Persuitti was located as a second robber to work with Caruso. (Tr. 1012, 1014, 1842-43)

Ferrier, Caruso, Dupaw and Persuitti* all discussed in different combinations the possible robbery, including the proceeds split, the mechanics of the robbery, departure routes and other details. (Tr. 1012-14, 1018, 1020, 1022, 1031, 1843-45) On March 26, 1976 Ferrier, Caruso and Persuitti went to The Merchants Bank on White Street in South Burlington, Vermont where Ferrier pryed open the window and Persuitti and Caruso went inside. (Tr. 327-38, 1024-35, 1844-64) Persuitti and Caruso were to wait inside the bank, surprise the employees in the

* Over the periods of time relevant here Dupaw was incarcerated at the Chittenden Community Correctional Center, South Burlington, Vt., but able to get out during the day for some purposes when accompanied by a guard such as Jeffrey Wall; Anthony Persuitti was likewise incarcerated but able to get out on daily and some weekend passes; Paul Caruso was on extended furloughs and then parole and Douglas Ferrier was initially incarcerated, then on furloughs and finally on parole.

morning and rob the bank, but they did not like the look of the broken lock on the window and left through the entry window. (Tr. 1042-44, 1035, 1863-64)

Ferrier discovered after the abortive break-in that no new alarm system (such as a perimeter alarm) had been installed at the bank so he, Caruso, Persuitti and Dupaw agreed that another try was in order. (Tr. 1865, 1866-67) For several consecutive weekends, however, Persuitti was not able to obtain the pass he needed to commit the robbery. (Tr. 1039, 1867) Ferrier then agreed to rob The Merchants Bank in South Burlington with Caruso. (Tr. 1885-86, 1046-47) Dupaw was to receive a split of Caruso's proceeds both when Caruso went in with Persuitti and when Caruso actually robbed the bank with Ferrier. (Tr. 1039, 1047)

Ferrier and Caruso first broke into the Franklin-Lamoille Bank in Milton, Vermont in the early morning hours of April 28, 1976 with the idea of committing a robbery similar to that planned in March for The Merchants Bank, however, they tripped an alarm and fled. (Tr. 275-78, 1048, 1886-87)

On the evening of April 30, 1976, Ferrier and Caruso met with Persuitti at REACH, a community house intended as a meeting place for ex-offenders and those on pass from the Correctional Center, and prepared for the

robbery of The Merchants Bank.* (Tr. 1016, 1058-61, 1384-88, 1890-92, 2958-67)

Ferrier and Caruso left REACH in the early morning hours of May 1, 1976 and went to the bank. (Tr. 1060-63, 1891-93)

Ferrier and Caruso broke into the bank by a rear window, waited until morning when the employees came into the bank and opened the vault, following which they held the employees at gun point and took \$76,135.21 in cash and travelers checks from the bank. (Tr. 279-86, 295-319, 494-501, 785-92, 1059-65, 1891-96) Ferrier and Caruso stole a car at the bank and went to a location in Mallets Bay, Vermont, near Burlington, where defendant Dupaw had an auto repair business with another individual, Gary Marshal. (Tr. 1066-70, 1896-97) Ferrier and Caruso split up the money and Ferrier took the travelers checks. (Tr. 1070-72, 1076, 1097-99) Caruso then went to the Correctional Center to see Dupaw who suggested that Caruso should bring some of the money to the Correctional Center for Dupaw to look over. (Tr. 1074-75) Caruso went back to the Correctional Center that evening with \$3,000.00

* Ferrier and Caruso also met Persuitti at REACH on the night before going to the banks for the earlier burglaries. Tr. 1027-31, 1051-53, 1851.

to \$4,000.00 in bank robbery proceeds which he displayed to Dupaw, who checked it for marks. (Tr. 1082) Dupaw concluded he could not properly examine the money at the Correctional Center and he enlisted defendant Jeffrey Wall, a guard at the Correctional Center, to take him to Mallets Bay to look over the money. (Tr. 438-43, 1085-86) Dupaw and Wall went to the garage where Dupaw counted the money and sorted it according to whether he felt it was marked. (Tr. 442-45, 1085-86) Thereafter, Dupaw and Wall again met with Caruso on several occasions for dealings with the money and on two occasions Wall received money for his use from Caruso and Dupaw. (Tr. 445-62, 1086-95) On one occasion, shortly after the robbery, Wall took Dupaw out of the Correctional Center to Caruso's residence in Winooski, Vermont, just outside Burlington, where arrangements were made with Bernard Woodmansee, Sr. for Woodmansee to wash, or exchange for different unidentifiable currency, some of the bank robbery money for a 15% fee. (Tr. 445a-54, 1088-91) Caruso thereafter transferred money to Woodmansee, Sr. either directly or through Jeffrey Wall with the washed money coming back to Caruso in several different ways. (Tr. 455-58, 1091-1120)

Dupaw was in effect the bookkeeper for the stolen money, maintaining a record of to whom money should be credited and debited in connection with the washing and

receiving himself \$2,000.00 from Caruso. (Tr. 1112, 1119-21) Dupaw made a special adjustment, however, when some of the bank robbery money received by Wall from Caruso was transferred at Dupaw's request to Bernard Woodmansee, Jr. to allow him to post bail for his father.* (Tr. 1121-24) The amount of the bail was credited to Jeffrey Wall's bill and added to Bernard Woodmansee, Sr.'s bill. (Tr. 1121-24) Following Woodmansee, Sr.'s arrest, the money was washed through Jacky DuBray who was from New York State. (Tr. 1126-27)

On May 4th, Woodmansee, Sr. met with his son, Bernard J. Woodmansee, Jr., and John S. Savo where arrangements were made for Savo and Woodmansee, Jr. to travel to New York State the following day to wash \$5,000.00 of the bank robbery proceeds. (Tr. 882-83) On May 5th Savo went to Woodmansee, Jr.'s house and saw the \$5,000.00 brought there by Woodmansee, Sr. (Tr. 882-86) Savo was told that this was money from the bank robbery. (Tr. 887)

* The bail money was obtained by the F.B.I. from the bail bondsman and found to be part of the bait money taken in the robbery. GX 12, 53; Tr. 337, 461-65, 806, 851-60, 1123, 1681-83

Woodmansee, Sr.* later in the year discussed with Douglas Ferrier on a couple of occasions the possibility of washing some of the travelers checks for Ferrier, but nothing came of it.** (Tr. 1901-04)

* Woodmansee, Sr. had been arrested with Jacky DuBray on May 23, 1976 on charges relating to transportation from New York to Vermont of \$20,000.00 in stolen travelers checks. DuBray, Woodmansee, and a third individual, Roy Hamlin, were found guilty, after a two-week trial, on November 6, 1976. DuBray was sentenced to a term of five years. See D. Vt. Cr. No. 76-38. His conviction was affirmed by this Court, docket no. 77-1023, and the Supreme Court denied certiorari. DuBray subsequently was indicted for conspiracy to receive bank robbery proceeds, some of the money at issue here, plead guilty and was sentenced to eighteen months in the custody of the Attorney General, consecutive to the five years he received in Cr. No. 76-38. See D. Vt. Cr. No. 77-33.

** Ferrier washed his share of the bank robbery money through a South Burlington, Vermont bar owner by the name of Hugh Jeffries and sold the travelers checks to Jeffries. Tr. 1899-901, 1993-97, 2004-06. An indictment was filed on September 22, 1977 charging Jeffries in five counts with offenses relating to the facts described above. See D. Vt. Cr. No. 77-47. Jeffries, a citizen of Great Britain, is currently a fugitive. An associate of Jeffries, David Brown, was apprehended in Las Vegas, Nevada in May, 1977 while attempting to cash some of the travelers checks stolen from The Merchants Bank. Brown plead guilty on March 13, 1978 to transporting approximately \$15,000 worth of the stolen travelers checks from South Burlington, Vermont to Las Vegas and is awaiting sentencing in Nevada.

Douglas Ferrier met defendant Persuitti at REACH shortly after the robbery and discussed the robbery with Persuitti. (Tr. 1905-06) Ferrier gave Persuitti \$300.00 to \$500.00 from the robbery proceeds and told Persuitti he would be receiving additional money from Caruso. (Tr. 1906) Shortly after that, Persuitti advised Ferrier that Jeffrey Wall knew about the bank robbery and was working with Dupaw on some drug deals. (Tr. 1906-07)

Prior to the robbery, Persuitti had indicated to Ferrier that Dupaw was talking around the Correctional Center about the upcoming robbery, following which Ferrier spoke with Dupaw about this problem. (Tr. 1907)

POINT I

PROOF OF FEDERAL DEPOSIT INSURANCE
BY A PROPERLY AUTHENTICATED COPY
OF OFFICIAL RECORDS IS ADMISSIBLE,
CONSTITUTES THE BEST EVIDENCE OF
INSURANCE AND DOES NOT VIOLATE THE
CONFRONTATION CLAUSE.

The first items of evidence offered by the Government after opening statements in this case were certifications of official records (GX 1 and 2)* properly authenticated under Rule 44(a)(1), Federal Rules of Civil Procedure** and Rule 902, Federal Rules of Evidence, establishing that the banks referred to in the indictment were insured by the Federal Deposit Insurance Corporation at the relevant times. These official records, establishing an essential element of the Government's case, are clearly admissible as an exception to the hearsay rule. F.R.E. 803(8), (10).

Defendants nevertheless argue that the admission of such evidence, and apparently the rules which permit

* GX 1 is not discussed hereafter inasmuch as this pertained to The Franklin-Lamoille Bank in Milton, Vermont referred in Count 2 of the indictment. Judge Holden dismissed this count for unrelated reasons at the close of the Government's case. Tr. 2457-58. Defendant Dupaw indicates that GX 2 is reproduced in his Appendix, however, the exhibit which is reproduced at pages 1-3 of that Appendix omits the third page of GX 2, a certification by the Executive Secretary of the Federal Deposit Insurance Corporation concerning the insurance certificate issued to The Merchants Bank. See DA 1-3, GA A1-A4.

** Made applicable to criminal cases by Rule 27, Federal Rules of Criminal Procedure.

their admission, violate the Confrontation Clause of the Sixth Amendment.* The argument is frivolous.

The Sixth Amendment to the Constitution reads in part as follows:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him

The purposes of the confrontation clause have been described by the Supreme Court in the following manner:

Confrontation: (1) insures that the witness will give his statements under oath--thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the single "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

California v. Green, 399 U.S. 149, 158 (1970).

The decisions of this Court makes it clear that the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by insuring that "the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement."

* Although defendants objected to admission of the exhibits when offered, none claimed that their admission violated the Confrontation Clause of the Sixth Amendment as they all now argue. Tr. 273-74.

Dutton v. Evans, 400 U.S. 74, 89 (1970), citing California v. Green at 161.

The confrontation clause is not simply a codification of the hearsay rule, however, United States v. Puco, 476 F.2d 1099, 1102 (2d Cir.) cert. denied, 4143 U.S. 844 (1973). Nevertheless, the courts have carved out many exceptions to the hearsay rule, almost all of which comport with the confrontation clause. As noted by the Supreme Court in Pointer v. Texas, 380 U.S. 400 (1965):

This Court has recognized the admissibility against an accused of dying declarations, Mattox v. United States, 146 U.S. 140, 151, and of testimony of a deceased witness who has testified at a former trial, Mattox v. United States, 156 U.S. 237, 240-244. See also Dowdell v. United States, *supra*, 221 U.S. at 330; Kirby v. United States, *supra*, 174 U.S., at 61. . . . There are other analogous situations which might not fall within the scope of the Constitutional Rule requiring confrontation of witnesses.

Id. at 407 (footnote omitted).

In United States v. Kelly, 349 F.2d 720 (2d Cir. 1965), cert. denied, 384 U.S. 947 (1966) the defendant contended that the use of past recollection recorded violated the confrontation clause. The Court ruled otherwise:

The application of this doctrine, like the principles relating to dying declarations, prior testimony of deceased witnesses and indeed virtually all the exceptions to the

hearsay rule, does not involve any deprivation of the right of confrontation as the Sixth Amendment has been interpreted and construed.

Id. at 770. See United States v. Marshall, 532 F.2d 1279 (9th Cir. 1976) (use of chemist's report pursuant to F.R.E. 803(5) as past recollection recorded).

An examination of the F.D.I.C. certification at issue here clearly shows that it is the public record equivalent of a business record, a type of hearsay which is frequently subjected to the claim of a confrontation violation. In McDaniel v. United States, 343 F.2d 785 (5th Cir. 1965), cert. denied, 382 U.S. 826 (1965), the fifth circuit noted that it has been customarily held that the right of confrontation may not be invoked to exclude evidence otherwise admissible under well-established, legitimate exceptions to the hearsay rule.*

Id. at 789. Numerous cases support the admission of business records under virtually all circumstances. E.g., United States v. Leal, 509 F.2d 122 (9th Cir. 1975) (foreign hotel records accompanied by sworn affidavit before a U.S. vice-counsel describing contents and authenticating); United States v. Haili, 443 F.2d

* Citing Kay v. United States, 255 F.2d 476 (4th Cir. 1958); Matthews v. United States, 217 F.2d 403 (5th Cir. 1954); United States v. Leathers, 135 F.2d 507 (2d Cir. 1943); 5 J. Wigmore, Evidence § 1397.

1295 (9th Cir. 1971) (telephone toll records), United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1970) cert. denied, 401 U.S. 980 (1971) (bill of lading); United States v. Leathers, 135 F.2d 507 (2d Cir. 1943) (business records usually likely to be more reliable than dying declarations; Business Record Act does not violate the Sixth Amendment)*.

This circuit as well as the fifth and third circuits have ruled specifically that a public record virtually identical in nature to the F.D.I.C. certificate used here does not violate the confrontation clause. All three cases involve public documents of the same type used here which certified that specified firearms were not registered in the National Firearms Registration and Transfer Record. United States v. Cruz, 492 F.2d 217, 220 (2d Cir.) cert. denied, 417 U.S. 935 (1974); United States v. Mix, 446 F.2d 615, 621-23 (5th Cir. 1971); United States v. Thompson, 420 F.2d 536, 545 (3d Cir. 1970). The Court in Mix specifically noted that such records have been long held admissible. Id. at 622-23.

Defendants' contention that the admission of Government Exhibit 2 violated the confrontation clause surpasses the frivolous in view of the practical realization that virtually all banks are insured by the

* Cases cited by defendant Dupaw all deal with the sufficiency of the proof of insurance by the F.D.I.C. and not the confrontation clause.

Federal Deposit Insurance Corporation and the obviously adequate nature of the evidence introduced by the Government. Even under the most abstract theory, however, the Government's evidence came within the Federal Rules of Evidence and met the requirements of the confrontation clause. This Court's decision in United States v. Cruz, supra, is particularly appropriate for reference:

The justification for a new exception [admitting an ATF Certificate of Non-Registration of Molotov cocktail] is particularly evident in a case like the present, where the hearsay is reliable and where the practical need for it is great.

Id. at 220. The justification, reliability and practical need are equally great here and nothing in the arguments raised by the defendants* in any manner suggests that proof of insurance was inaccurate, or unreliable, nor that defendant would have benefited in any respect by having someone from the Federal Deposit Insurance Corporation present to testify that The Merchants Bank

* Defendants place considerable reliance on this Court's decision in United States v. Oates, 560 F.2d 45 (2d Cir. 1977). Oates, however, is based on an interpretation of the Federal Rules of Evidence and by its language did not rest on a confrontation determination. Id. at 80. Further, it can hardly be said that cross-examination in this case "might weaken the reliability of the statement," id. at 81, nor that the statement does not "bear sufficient indicia of reliability to assure an adequate basis for evaluating the truth of the declaration" Id., citing United States v. Puco, 476 F.2d 1099, 1103, 1105, 1107 (2d Cir.), cert. denied, 414 U.S. 844 (1973). Lastly, Oates is a very poor factual parallel to the situation here. See id. at 63-65.

was insured by the F.D.I.C. in March-May, 1976. Indeed, any witness would have to base his testimony on the F.D.I.C. records themselves because it is the only evidence of the fact of insurance.

POINT II

DEFENDANT DUPAW WAS NOT ENTITLED
TO BE GIVEN MIRANDA WARNINGS
WHEN CALLS TO HIM WERE TAPED
WITH THE CONSENT OF THE PARTY
INITIATING THE CALL

The United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966) held that an individual subject to custodial interrogation must be given an explanation of rights which has come to be known as "Miranda Warnings." The Supreme Court determination that such warnings were necessary was premised on the conclusion

that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crimes contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.

Id. at 467.

The Supreme Court in Miranda expressed its concerns for individuals who were subject to station house questioning and possibly tricked into giving incorrect answers which incriminated them. See Id. at 445-58. The requirement for warnings was intended to "dispel the compulsion inherent in custodial surroundings. . . ."

Id. at 458.

Although defendant Dupaw was literally in custody here inasmuch as he was in the Chittenden Community Correctional Center at the time that Paul Caruso placed

telephone calls to him, he was serving a state sentence, was not charged with any offense in connection with this case, and was not in custody in connection with this case.* As the contents of the telephone conversations themselves indicate, Dupaw was not subject to and did not perceive the type of compulsion which the Supreme Court was concerned with in Miranda. The very casual nature of the conversations, evidenced by the discussions of such topics as the condition of Caruso's car (Tr. 1219-21) and football games (Tr. 1228-29, 1246-47, 1252), hardly suggests the type of "interrogation" which the Supreme Court was concerned with in Miranda. Because no law enforcement officer was involved in the discussions directly, it also can not be said that the type of compulsion the Supreme Court was concerned with in Miranda was present here.

Defendant Dupaw has suggested that because Caruso was acting on behalf of the Government Dupaw was entitled to be given Miranda warnings. This suggestion is nothing short of frivolous for the reasons described above. See United States v. Bastone, 526 F.2d 971, 976-78 (7th Cir. 1975), cert. denied, 425 U.S. 973 (1976) (a party to a

* The conversations took place in January, 1976 and Dupaw was neither indicted nor arrested until March 31, 1977. Tr. 1206, 1230, 1251, 1272; DA 10.

telephone conversation takes the risk that a third party hears the contents of the conversation with the consent of the second party -- Miranda warnings not required).

POINT III

DEFENDANT DUPAW WAS NOT PREJUDICED BY LIMITING INSTRUCTIONS WHICH INDICATED THAT CERTAIN EVIDENCE WAS TO BE CONSIDERED ONLY AGAINST HIM INASMUCH AS THE EVIDENCE CLEARLY WAS ADMISSIBLE AGAINST HIM.

The Government's offer of cash drawers taken from The Merchants Bank during the robbery and a crow-bar used to open the window prior to the robbery were all admitted by the district court subject to a limiting instruction that this evidence was to be considered as to the defendant Dupaw only.* (Tr. 1668-70, 2332-34) Defendant Dupaw simply asserts that he was prejudiced by the limiting instruction which indicated that the evidence was to be considered only against him. However, the evidence pertained directly to only count 3 of the indictment, in which only Dupaw was named, and it was for this reason that the court ruled the evidence was admissible only as to defendant Dupaw.

THE COURT: The Court will instruct that in receiving Government's #15, this evidence is received only as it related to Count 3 of the indictment and against the defendant Dupaw only.

(Tr. 2333-34)

* The Government objected during the trial to the limiting instruction given by the Court on the ground that the exhibits were evidence of the existence of the conspiracy and applicable to all defendants. Tr. 1668, 2333.

Because the Court had concluded that the evidence did not pertain to the other defendants, even if this conclusion was incorrect, defendant Dupaw can hardly be heard to complain that he was prejudiced by it since the evidence clearly was admissible against him. The only party subject to any prejudice was the Government since the evidence should not have been so limited.

POINT IV

THE DISTRICT COURT PROPERLY PERMITTED THE GOVERNMENT TO INQUIRE INTO THE NATURE OF PERSUITTI'S PRIOR CONVICTION AND TO ENDEAVOR TO SHOW THAT THE SURROUNDING FACTS WERE RELEVANT AT THE INSTANT TRIAL; IN ANY EVENT, BECAUSE PERSUITTI SUCCESSFULLY RESISTED ANSWERING, THE QUESTIONS WERE INCONSEQUENTIAL AND HARMLESS BEYOND A REASONABLE DOUBT.

During defendant Persuitti's direct examination, his attorney elected to bring out Persuitti's prior conviction. Persuitti testified that he was serving an eight to twelve year sentence for a 1973 conviction for aggravated assault and that he had served time before that conviction also. (Tr. 2922; Persuitti's Br. 7-8)

Because the proof at trial demonstrated that Persuitti and several other defendants were in state custody intermittently during the period the bank robberies were planned and carried out, the fact of Persuitti's conviction certainly came as no surprise to the jury. Throughout the remainder of Persuitti's direct examination, he attempted to portray himself as a sick old man who held a responsible position at REACH and who was incapable physically and emotionally of a crime which involved entering a building illegally with a deadly weapon, as the Government's evidence showed. (Tr. 1044-45, 1851-52, 2928-29, 2970-73)

At the beginning of Persuitti's cross-examination, the Government sought to clarify the nature of Persuitti's conviction and questioned him verbatim from the official court record (GA A5-A6) which, of course, could have been introduced into evidence as proof of the conviction.

In addition, the Government sought to develop some of the facts surrounding the conviction. Persuitti claims, citing McCormick on Evidence, (2d ed. 1972) § 43, but no cases, that such further inquiry was error because "it is not the better practice according to McCormick." (Persuitti's Br. 12)

This argument misapprehends the basis for the Government's further inquiry. Having clarified the conviction, the Government was seeking to use the conviction, not only to impeach the credibility of Persuitti, but as affirmative proof of a prior similar act which arguably bore on the defendant Persuitti's state of mind at the time of the crime for which he was on trial. Rule 404(b), Federal Rules of Evidence, following the long established second circuit "inclusionary" approach, provides that such evidence may be admissible if it is offered to prove motive, opportunity, intent, preparation, plan knowledge, identity or absence of mistake or accident. From the facts set forth in the appeal from Persuitti's state conviction, State v. Persuitti, 133 Vt. 354, 339 A.2d 730 (1975), it appears that the crime of

which he was convicted involved a plan by several perpetrators to enter a building with weapons, assault the occupant, and search for money believed to be located there.

At the instant trial, Persuitti defended on the grounds that he was a sick old man (Tr. 3635), physically incapable of doing what he was charged with (Tr. 3636), from a "different school" than the Government's witnesses (Tr. 3643), and thus unlikely to commit such a crime. (Tr. 3643)

In light of this defense, and the testimony on which it was based, the District Court permitted inquiry into Persuitti's conviction. Traditionally, the trial judge has broad discretion in allowing cross-examination of a defendant who testifies, particularly where the direct testimony constitutes a general denial of any wrongdoing.*

In addition, the District Court properly charged the jury that this evidence could not be considered

* This Court recently reaffirmed the broad discretion vested in trial judges to permit even extrinsic evidence of similar acts particularly where the defense "opens the door" and makes the similar act relevant to impeaching a defendant's broad denial. *United States v. Benedetto*, No. 77-1306 (2d Cir. February 24, 1978) at 1742; *United States v. Gubelman*, No. 77-1279 (2d Cir. February 24, 1978).

"as in any way bearing on Mr. Persuitti's personal character, or his propensity for criminal conduct"
(Tr. 3718; DA 34)

In any event, the inquiry was notably unsuccessful at eliciting any information from Persuitti beyond that contained in the record of conviction. In substance, Persuitti denied entering a dwelling, denied any use of a deadly weapon and denied responsibility for an accomplice. It is apparent that the Government became weary of the inquiry, abandoned it and did not refer to the examination at any later point during the trial, even in summation. Accordingly, the error, if any, in permitting the inquiry was obviated by the fact that the inquiry was totally fruitless. Moreover, the evidence against Persuitti consisted of direct and independent testimony by two accomplices during a six week trial that he had entered the bank with intent to commit a felony and had shared in the proceeds of the bank robbery. In light of such proof, the evidence sought, even if it had been obtained, would constitute error which was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967); United States v. Corey, 566 F.2d 429 (2d Cir. 1977) (cross-examination in fraud prosecution about falsification of documents 16 years earlier, the subject of firing but not prosecution, held harmless).

CONCLUSION

The judgment of the District Court should be affirmed.

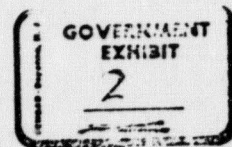
Respectfully submitted,

WILLIAM B. GRAY
United States Attorney for
the District of Vermont
Attorney for the United
States of America

JEROME F. O'NEILL
Assistant U.S. Attorney,
Of Counsel

March 29, 1978

APPENDIX



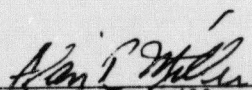
PROOF OF OFFICIAL RECORD

I, Alan R. Miller, hereby certify and attest that I am Executive Secretary of the Federal Deposit Insurance Corporation and that the annexed copy of an excerpt from the official records of the Corporation, marked "Exhibit 'A'", is a true and correct copy of the original entry in the official records of the Corporation. "Exhibit 'A'" certifies that effective September 6, 1974, The Merchants National Bank of Burlington, Burlington, Vermont, converted from a National bank to an insured State Nonmember bank, with the title "The Merchants Bank". I do hereby further certify that after diligent search no record or entry in the official records of the Federal Deposit Insurance Corporation is found to exist which terminated the status of The Merchants Bank as an insured bank under the provisions of section 8(a) of the Federal Deposit Insurance Act, as amended (12 U.S.C. 1818(a)), and that I have the custody of the official records of the Federal Deposit Insurance Corporation, including the record, a copy of which is annexed hereto and attested by me.

DATED: January 24, 1977

(SEAL)

26251



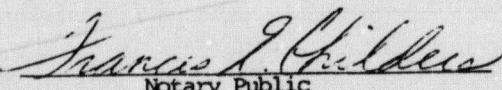
Alan R. Miller
Executive Secretary
FEDERAL DEPOSIT INSURANCE CORPORATION

CITY OF WASHINGTON)ss
DISTRICT OF COLUMBIA)

I, Frances E. Childers, a Notary Public in and for the District of Columbia, hereby certify that Alan R. Miller is Executive Secretary of the Federal Deposit Insurance Corporation and has custody of the official records of the Federal Deposit Insurance Corporation; and I hereby further certify that I have a seal of office and have official duties in the District of Columbia where the aforesaid records are kept.

DATED: January 24, 1977

(SEAL)



Notary Public

My commission expires: April 14, 1979

FEDERAL DEPOSIT INSURANCE CORPORATION

DIVISION OF RESEARCH

October 1, 1974

NAME OF BANK

*The Merchants National Bank of Burlington
Burlington, Vermont 05401
(50-0240 - 03 - 06268-5)

EFFECTIVE DATE

September 6, 1974

ACTION TAKEN

Subject bank converted from a National bank to an insured State Nonmember bank, with the title

"The Merchants Bank"

Branches are operated at Barre, Bristol, Burlington (2), Essex Junction, Northfield, South Burlington (2) and South Hero, Vermont.

(Chittenden County)

Division of Research

By: Ruby K. Kingsbury

DISTRIBUTION

Secretary
Office Copy (2)
Regional Director (2)
Review Section
Central Files
Bank Reports
Fiscal Agent
Information Office
Review Section - Trust
Report Control
Div. of Bank Supv.

Address of Bank:
123 Church Street
Burlington, Vermont 05401

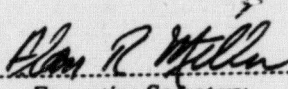
CMH

CERTIFICATION

I, Alan R. Miller, Executive Secretary
of the Federal Deposit Insurance Corporation, hereby certify and attest that
the attached duplicate copy of the certificate of insurance issued to
The Merchants Bank, Burlington, Vermont
is a true and correct copy of the original.

DATED: January 24, 1977

26251


Executive Secretary
FEDERAL DEPOSIT INSURANCE CORPORATION

(SEAL)



DUPLICATE

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D. C.

Hereby certifies that the deposits of each depositor in

THE MERCHANTS BANK

BURLINGTON

VERMONT

are insured to the maximum amount provided by the
Federal Deposit Insurance Act



No: 6268-5

In testimony whereof, witness my signature and the seal of the

Corporation this 6th day of September, 1974

Attest:

Alan R. Miller
EXECUTIVE SECRETARY

Frank Wille
CHAIRMAN OF THE BOARD OF DIRECTORS

NT

73 Co A

Circuit

PERSUITTI

Age 45-
S, NY

Arrested on
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DO NOT WRITE INSIDE SQUARE BELOW

12/2/77 Certified to be a true copy of the original as the same appears on file in this office.
[Signature]
Clerk Vt. District Court
Chittenden Circuit

OFFICER'S CERTIFICATE

STATE OF VERMONT } At Burlington
Chittenden } In said County, this 23
day of Jan, 1973
by virtue of this precept, I arrested the body of the
within named Anthony Persutti
read the same in his hearing, and have him in Court as
I am within commanded. I traveled 1 miles to place
of arrest, and transported him 1 miles to Court-
house Correctional Facility.
I brought him into Court on the dry of
19, and transported him
1 miles
Attest, Earl Martin
Sheriff, Deputy Sheriff, Police Officer, Constable,
State Police Officer, Fish and Game Warden,
Deputy Probation Officer, Motor Vehicle Inspector.

BILLS OF COSTS

GRAND JUROR FEES:

Nol. pros. waiving examination, or plea of guilty (1.50).....
Trial by Court (2.00); by jury (2.50).....
.....miles travel (.10) one way; if more than one case
tried at same time (.05) per mile one way each case.....

JURORS:

.....days (\$15.00).....
.....miles (.08) each way.....
.....meals \$.....(if credit not extended).....

WITNESSES:

.....days (\$10.00).....
.....miles (.08) each way.....

Total

Judge

1/31/73 Verdict of Guilty
D. P. S. 2000
for possession of
subject
Res. memo for judgment
N.O.V.
Court on 2/1/73
P.D. sentence investigating station
order
Notice to D.P. 2-1-73
3/9/73 Motion for new
trial denied.
Motion for judgment N.O.V.
denied.
Motion for judgment of guilty
on the basis of guilty
judgment of guilty
Sentence - 10 to 15 years
8 years more than
12 years in custody of
correctional institution.
Verdict 3/14/73 Notice of
Conflicted of: Felony Appeal or
Sentence Filed
7/5/73 Certified to Supreme Ct.
6/3/78 Judgment affirmed
6/27/78 set to Dist
Date of sentence, 19
Fine \$
With alternate sentence of days
Paid in full
Mittimus issued 3/9/73
Committed
Conviction report 3/9/73
Pres. Officer
Att'y for Resp. P. D. Moore
Assigned: Yes ☒ No ☐

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

Appellee

v.

JOSEPH H. DUPAW

ANTHONY PERSUITTI

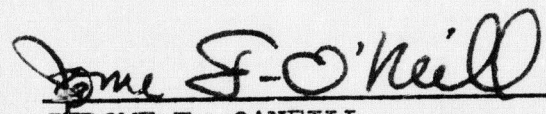
BERNARD J. WOODMANSEE, SR.

Appellants

DOCKET NO. 77-1391
77-1392
77-1393

CERTIFICATE OF SERVICE

I, Jerome F. O'Neill, Assistant U.S. Attorney for the District of Vermont, hereby certify that I have this 29th day of March, 1978 served all defendants through their counsel, William C. Kittell, Esq., Duncan F. Kilmartin, Esq. and John T. Sartore, Esq. with two copies of the Brief and Appendix of the United States.


JEROME F. O'NEILL
Assistant U.S. Attorney

